U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

AUG 08 2016

The Honorable Charles E. Grassley
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Grassley:

Thank you for your June 7, 2016 letter. Secretary Johnson asked that I respond on his behalf.

You expressed concerns about the B visa program. I appreciate the opportunity to respond to your concerns. Detailed responses to your questions on those issues that fall within the jurisdiction of the Department of Homeland Security and U.S. Citizenship and Immigration Services are enclosed with this letter.

Thank you again for your letter and interest in this important issue. Should you wish to discuss this matter further, please do not hesitate to contact me.

Respectfully,

León Rodríguez
Director

Enclosure

The Department of Homeland Security's Response to Chairman Grassley's June 7, 2016 Letter

1. **In a letter from the Department of State, dated July 13, 2012, the Department stated that between 2007 and July 13, 2012 "more than 13,000" "B in lieu of H" visas were issued.**

   a. **Please provide an update of that total number, with a year-by-year breakdown for the number of "B in lieu of H" visas issued since 2007.**

      As the Department of State (DOS) is the visa issuing authority, the Department of Homeland Security (DHS) defers to DOS on this question.

   b. **Are consular officers required to annotate "B in lieu of H" visas? If not, would you consider making such annotations a requirement so that, from now on at least, the Department of State can better track how many such visas are issued?**

      DHS defers to DOS on this question.

2. **Was the visa issued to Mr. Lesnik, or to any of the workers brought over by Bitmicro, considered a "B in lieu of H" visa – i.e. covered under 9 FAM 402.2-5(F)?**

   DHS defers to DOS on this question.

3. **Were any of the visas issued to the group of Vuzem workers, or to the Bitmicro workers, not considered "B in lieu of H" visas?**

   DHS defers to DOS on this question.

4. **How many B visas in total were issued to Vuzem workers for the Tesla construction project in question?**

   DHS defers to DOS on this question.

5. **How many B visas in total were issued to Bitmicro workers in the Philippines between July 21, 2012 and July 20, 2015?**

   DHS defers to DOS on this question.

6. **Federal regulations at 8 C.F.R. 214.2(b)(5) provide:**

> **Construction workers not admissible. Aliens seeking to enter the country to perform building or construction work, whether on-site or in-plant, are not eligible for classification or admission as B-1 nonimmigrants under section 10l(a)(15)(B) of the Act. However, alien nonimmigrants otherwise qualified as B-1 nonimmigrants may be issued visas and may enter for the purpose of supervision or training of others engaged in building or construction work, but not for the purpose of actually performing any such building or construction work themselves.**

a. **Was Mr. Lesnik's B visa application approved, notwithstanding his engagement in construction work, because he was deemed a "supervisor" in the work at the Tesla facility?**

DHS defers to DOS on this question.

b. **How many of the B visas issued to the group of approximately 150 Vuzem workers were for supervisory positions?**

DHS defers to DOS on this question.

c. **If any of the visas issued to the Vuzem workers were not for supervisory work, under what possible legal basis were they issued in light of the regulatory prohibition on construction work?**

DHS defers to DOS on this question.

d. **Did any of the Vuzem workers present documentation to the U.S. consular officers adjudicating their visa applications misrepresenting the nature of their prospective activities in the United States?**

DHS defers to DOS on this question.

e. **What is the exact legal justification for the supervisory exemption from the general prohibition on construction work in B visa status at 8 C.F.R. 214.2 (b)(5)? Please cite to specific Board of Immigration Appeals precedent cases and provide a full and detailed legal explanation.**

The long-standing regulation in question, 8 C.F.R. § 214.2(b)(5) was promulgated more than 20 years ago in furtherance of the joint agreement reached in *International Union of Bricklayers v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985). *See* 51 Fed. Reg. 44,266 (Dec. 9, 1986) (final rule); 51 Fed. Reg. 27,047

(July 29, 1986) (proposed rule). That regulation is consistent with Board of Immigration Appeals precedent governing permissible "business visitor" activities that may be undertaken as a B-1 nonimmigrant consistent with section 101(a)(15)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(B). *See also* 8 C.F.R. § 214.2(b); 22 C.F.R. § 41.31. As the Board has recognized, there are no inflexible rules to be applied in making such factual determinations and that sound judgment must be exercised consistent with the Board's guidance and applicable regulations.

In *Matter of Hira*, 11 I&N Dec. 824 (BIA 1965, A.G. 1966), the Board of Immigration Appeals (BIA) held, and the Attorney General affirmed, that B-1 nonimmigrant status was appropriate given the following facts:

1. The alien's activity involved intercourse of a commercial character;
2. The alien had a clear intent to continue a foreign residence and not to abandon any existing domicile;
3. The alien's salary came from abroad;
4. The principal place of business and the actual place of eventual accrual of profits, at least predominantly, remained in a foreign country; and
5. The alien's stay in the United States was temporary, even though his business activity itself was not and may long continue.

In *Matter of Neill*, 15 I&N Dec. 331 (BIA 1975), the BIA held that "an alien need not be considered a 'businessman' to qualify as a business visitor, if the function he performs is a necessary incident to international trade or commerce."

Along similar lines, in *International Union of Bricklayers v. Meese*, 616 F. Supp. 1387 (N.D. Cal. 1985), a U.S. company entered into a purchase contract with a foreign firm that called for "installation" of elements of the purchased system, which involved certain bricklaying skills. The foreign firm sent employees who engaged in actual construction activities that the court concluded might have been performed by U.S. construction crews. Ultimately, it was determined that it may be appropriate to admit one or more of a foreign firm's employees in B-1 status for the purpose of supervising the construction or for training U.S. workers, but admission under the B-1 classification would be considered impermissible for actual construction workers. The current B-1 regulation permitting limited supervision by a B-1 nonimmigrant emerged from the *Bricklayers* case and was a result of a notice and comment rulemaking. *See* 51 Fed. Reg. 44,266 (Dec. 9, 1986) (final rule); 51 Fed. Reg. 27,047 (July 29, 1986) (proposed rule).

7. **The letter I received from the Department of Homeland Security on July 18, 2011, states that B-1 visitors can't work in the United States except for "very limited circumstances," and then cites as examples certain personal or domestic servants. Such servants (e.g. a maid or cook) are authorized to apply for employment authorization under 8 CFR 274a.l2(c)(17) if they are accompanying an employer who is in the United States in B, E, F, H, I, J, or L nonimmigrant status. Please provide the exact legal justification for allowing domestic or personal servants to work, potentially for years, in the United States in B visa status. Please cite to specific Board of Immigration Appeals precedent cases and provide a full and detailed legal explanation. I am particularly interested in the legal justification for allowing employment in B status for a personal or domestic servant of an alien in long-term nonimmigrant status, such as an H-1B specialty occupation worker.**

   Certain personal or domestic workers are permitted to continue their domestic employment while temporarily in the United States when they accompany or follow to join their employer for a brief period and the locus of their employment remains oversees. *See* 8 C.F.R. § 274a.12(c)(17). That regulation, reflecting long-standing interpretation of the B-1 classification, was promulgated more than 25 years ago. *See* 55 Fed. Reg. 25,928 (June 25, 1990); *see also* 52 Fed. Reg. 36,783, 36,784 (advance notice of proposed rulemaking describing such activity as consistent with B-1 classification).

   It has long been the view of the Department of State, DHS, and the former Department of Justice Immigration and Naturalization Service that the requirements described in 8 C.F.R. § 274a.12(c)(17), such as a pre-existing employer-employee relationship between the personal or domestic servant and the employer while overseas, that the servant may only work for that specific employer, and that the servant not abandon his or her overseas residence, establish that qualifying domestic work may properly be classified under the B-1 category, consistent with applicable legal authorities. Under those narrowly defined circumstances, such a personal or domestic servant may be deemed to be in the United States solely in connection with his or her foreign employment.

8. **The Department of State, in its May 13, 2011 response to my April l4, 2011 letter, never answered this question: "What is the legal basis for the State Department's policy known as 'B-1 in lieu of H-1B'?" Please answer the question with a full and detailed legal explanation.**

   DHS defers to DOS on this question, which is directed to DOS.

9. I observed in my April 14, 2011 letter that the Immigration and Naturalization Service (INS) in 1993 proposed a regulation to eliminate B-1 in lieu of H citing inconsistency with Congressional intent. This was the discussion from the 1993 proposed rule that I had in mind:

> **The Service believes that, in light of the numerical restrictions, labor condition requirements, and revised definition of the H-1 B category contained in [the Immigration Act of 1990], it would violate Congressional intent to allow admission of an otherwise classifiable H-1 B nonimmigrant as a B-1 simply because the alien will not receive any salary or other remuneration from a U.S. source. It is, therefore, the position of the Service that the section of the [Operating Instructions] providing for "B-1 in lieu of H -1" status is now inconsistent with the Congressional intent to control the number of H-l B visas issued, as well as the intent to safeguard the working conditions of United States workers, and should be deleted.**

"Nonimmigrant Classes; B Visitor for Business or Pleasure," U.S. Department of Justice, Immigration and Naturalization Service, Proposed Rule, 58 FR 58982, 58982-83 (Nov. 5, 1993).

a. Why was the 1993 proposed rule never finalized?

Please see response to Question 9(b) below.

b. Does the Department of Homeland Security stand by the assessment of the "B-1 in lieu of H" concept made by its predecessor agency in the 1993 proposed rule?

In 1993, DOS and the Department of Justice Immigration and Naturalization Service jointly published companion notices of proposed rulemaking that proposed amendments to the regulations governing the B-1 classification, including a proposal to modify the "B-1 in lieu of H" guidance. DHS's understanding is that the rule received significant comments on a wide range of the proposed B-1 regulations, and a final rule was never published, although the specific reasons for not being published are unclear. DHS intends to continue examining policy options regarding the "B-1 in lieu of H" guidance in coordination with the Department of State.

10. What are the potential sanctions, civil or criminal, that could be imposed on companies for employment of an unauthorized alien (section 274A of the Immigration and Nationality Act)?

Under the Immigration and Nationality Act (INA), it is unlawful for an employer to knowingly hire or retain an alien who is unauthorized to work. *See* INA § 274A(a)(1)(A), (a)(2); 8 U.S.C. § 1324a(a)(1)(A), (a)(2). Section 274A(e)(4) of the INA, 8 U.S.C. § 1324a(e)(4), establishes civil sanctions for violating these provisions, including cease-and-desist orders with monetary penalties. As of August 1, 2016, civil fines can be imposed in the amount of (1) not less than $275 and not more than $4,313 per unauthorized alien for a first violation, (2) not less than $2,200 and not more than $10,781 per unauthorized alien for an employer previously sanctioned under INA § 274(e), and (3) not less than $3,300 and not more than $21,563 per unauthorized alien for an employer previously sanctioned more than once under INA § 274(e). *See* 8 C.F.R. § 274a.10(b)(1)(ii), 81 Fed. Reg. 42987 (July 1, 2016).

An employer who engages in a pattern or practice of violating INA § 274A(a)(1)(A) or (a)(2) is subject to criminal penalties under INA § 274A(f), 8 U.S.C. § 1324a(f). Such an employer shall be fined not more than $3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both. Additionally, if there is reasonable cause to believe that an employer is engaging in such a pattern or practice, the Attorney General may bring a civil action in a U.S. District Court to request a permanent or temporary injunction, restraining order, or other order, as deemed necessary by the Attorney General.

11. What are the potential sanctions, civil or criminal, that could be imposed on the foreign workers brought over in B status by companies if they are found to have violated the terms and conditions of their B visa status?

Aliens admitted to the United States as nonimmigrants and found to be working in the United States without authorization or in violation of their nonimmigrant status may be removable under section 237 of the INA, 8 U.S.C. § 1227. An alien who attempts to enter or obtains entry to the United States by a willfully false or misleading representation, in violation of section 275 of the INA, 8 U.S.C. § 1325, is subject to fine under title 18 of the United States Code, or imprisonment for not more than six months, or both, for a first offense. For a subsequent offense, an alien is subject to a fine or imprisonment for not more than two years, or both.

12. How many of the Vuzem workers in question remain in the United States and in what immigration status?

DHS does not at this time have information identifying these workers in question sufficiently to perform any immigration records checks.

13. How many of the Bitmicro workers in question remain in the United States and in what immigration status?

DHS does not at this time have information identifying the workers in question sufficiently to perform any immigration records checks.

14. The letter I received from the Department of Homeland Security on July 18, 2011 states: "With regard to the 'B-1 in lieu of H-1 B' interpretation, DHS will coordinate with the State Department to develop guidance clarifying the scope of activities permissible in the B-1 business visitor classification." The Department of State states in its letter dated May 13, 2011: "We are working with the Department of Homeland Security (DHS) to consider removing or substantially amending the FAM note that you referenced ... We are in the process of discussing with DHS removing or substantially modifying the B-1 in lieu of H guidelines, which State first proposed eliminating in a 1993 Federal Register notice. This change requires DHS coordination and may require Federal Register notice, thus it may take some time before ... any change is implemented." Finally, the Department of Homeland Security stated in its letter dated September 20, 2012: "In coordination with the Department of State, DHS remains actively engaged in the development of guidance clarifying the scope of employment permissible in the B-1 business visitor classification."

Almost four years have passed since the last of these assurances that B visa guidance was going to be overhauled and yet absolutely *nothing* has been done. In particular, discussions between State and DHS regarding the elimination of "B in lieu of H" were, by the Departments' own admission, occurring in 2011 – *five years ago* – yet, again, nothing has been done, the integrity of the B visa program continues to be degraded, and American workers continue to be injured. Please describe, in detail, what, if anything, has been done since the last exchange of letters in 2011 and 2012 and when, exactly, updated regulatory or field guidance eliminating the "B in lieu of H" provisions and clarifying permissible activities in B status will be published.

As noted, DHS continues to explore policy options regarding the "B-1 in lieu of H" guidance in coordination with the Department of State. There is no specific timetable for issuance of regulations or revised guidance, but our interagency discussions are ongoing.

15. According to the Infosys Settlement Agreement:

(E) Infosys agrees to retain, at its own expense, an independent third-party auditor or auditing firm to review and report on its I-9 compliance. One year from the date this agreement is signed, and for one additional year, the auditor shall analyze a random sample of not less than four percent of Infosys's existing United States workforce to determine if the I-9 forms associated with the workforce have been completed and maintained in full compliance with the requirements of 8 U.S.C. § 1324a. The independent auditor or auditing firm must submit a signed report to the United States Attorney for the Eastern District of Texas regarding the results of the analysis within 60 days of the first and second anniversaries of the signing of this Agreement.

(F) Infosys agrees that it will submit a report to the United States Attorney for the Eastern District of Texas, within 60 days of the first anniversary of the signing of this Agreement describing whether its B-1 visa use policies, standards of conduct, internal controls, and disciplinary procedures have been effective in ensuring compliance with paragraph III.A.3 of this Agreement. Infosys also understands that, for two years after the date of the signing of this Agreement, the United States will review random samples of documents that Infosys has submitted to U.S. Consular officials and other immigration officials in support of its B-1 visa holders to determine whether Infosys remains in compliance with this Agreement.

(a) Please provide me with-
(i) a copy of the reports described in (E) that have been filed so far; and
(ii) the report required in (F) describing the effectiveness of Infosys B-1 visa policies.

DHS defers to the Department of Justice (DOJ) regarding this request.

(b) Have any reviews of random samples of documents that Infosys has submitted to consular officers, as described in (F), occurred? If so, what were the results of such reviews? Please send me a copy of any report of such random sample review. If such reviews have not happened, why not?

DHS defers to DOJ on this question.